

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original - Affidavit of Mailing

74-1011

To be argued by
PAUL F. CORCORAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1011, 74-1021, 74-1063

UNITED STATES OF AMERICA,

Appellee,

—against—

PATRICK RAYLL, ANTHONY POLITO, and
JESSIE PEARSON,

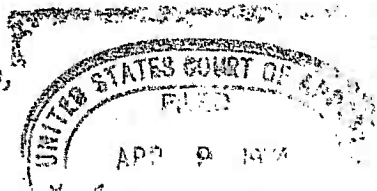
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

EDWARD JOHN BOYD, V.
*United States Attorney,
Eastern District of New York.*

RAYMOND J. DEARIE,
PAUL F. CORCORAN,
*Assistant United States Attorneys,
Of Counsel.*



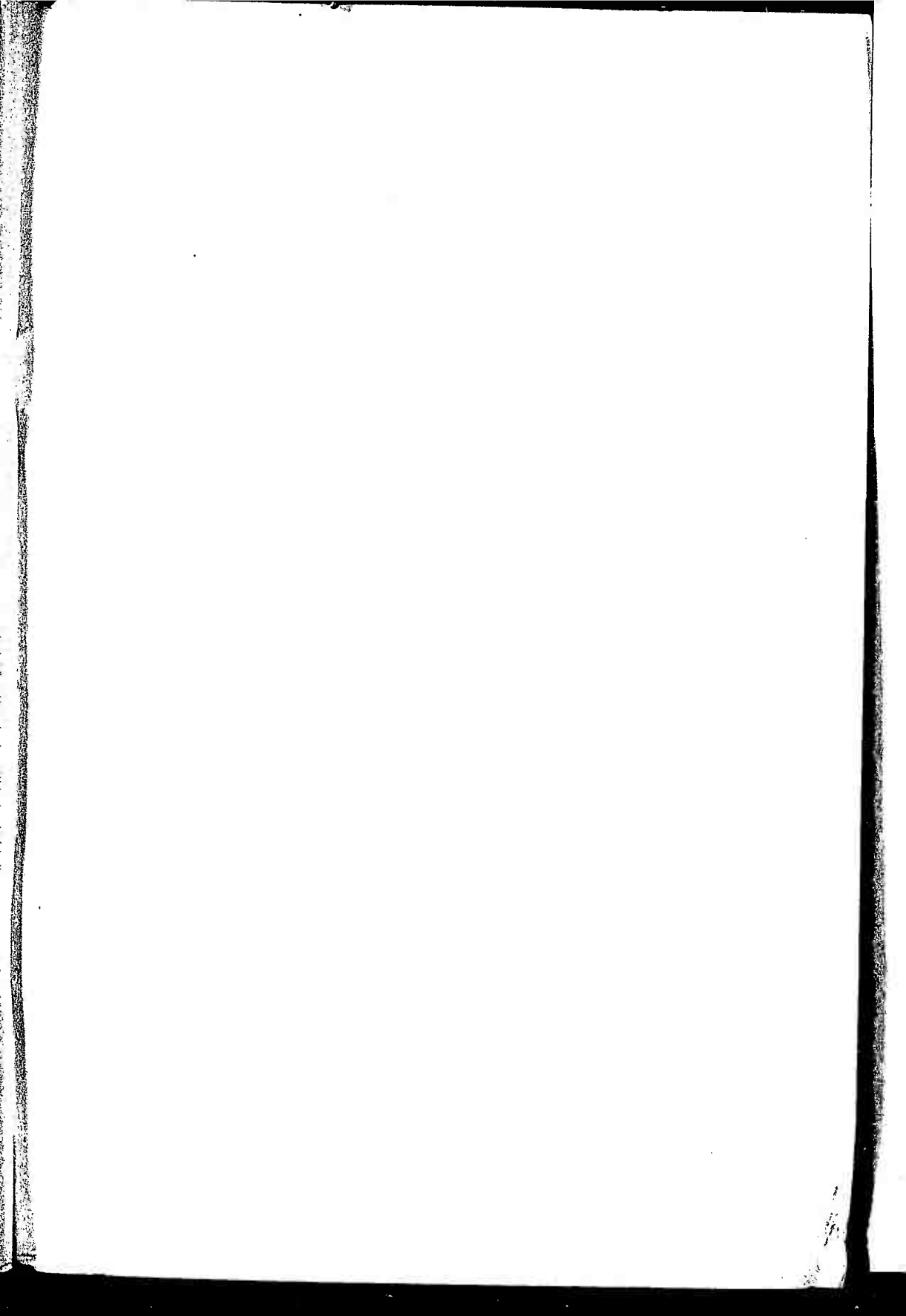


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UNITED STATES OF AMERICA,

Appellee,

—against—

PATRICK RAYLL, ANTHONY POLITO, and JESSIE PEARSON,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Patrick Rayll, Anthony Polito and Jessie Pearson appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York (Judd, J.), after a jury trial, convicting the appellants together with a co-defendant, Thomas Buttafuoco,* of one count of receiving stolen goods in violation of Title 18 United States Code, Sections 2315 and 2.

Appellants together with co-defendant Buttafuoco were charged in a one count indictment with having wilfully and unlawfully received and concealed a quantity of stolen Colgate-Palmolive products, valued at approximately one

* Co-defendant Buttafuoco had filed a notice of appeal and by order dated January 9, 1974 was directed to file his brief and appendix on or before March 5, 1974. Upon his failure to file, the Court dismissed his appeal by order dated March 22, 1974.

hundred and ten thousand dollars (\$110,000), which articles were moving as a part of and constituted interstate commerce from Elizabeth, New Jersey to Plainview, New York. Upon their convictions, appellants were sentenced as follows: Rayll was sentenced to four years in prison with eligibility for parole after one year; Polito was sentenced to two and a half years and was fined \$2,500.00; Pearson was sentenced to one year, 60 days to be served on 3 day week-ends and the balance to be suspended; he was also placed on probation for two years and was fined \$1,000.00. Buttafnoco, whose appeal was dismissed, was sentenced to two years, six months to be served and the balance to be suspended; he was also placed on probation for two years and was fined \$1,000.00. The appellants are free on bail pending this appeal.

On appeal, the only issue raised by appellants Rayll and Pearson, and one which is also raised by appellant Polito, concerns the introduction in evidence of a letter written by Assistant United States Attorney Peter Schlam promising immunity to an accomplice-witness, Ira Kirschner, in return for Kirschner's promise to testify "truthfully and completely" concerning the alleged crime. Appellants contend that the language of the letter constituted a prejudicial bolstering of the credibility of the Government's witness. Appellant Polito additionally argues that the conviction is improperly based upon uncorroborated accomplice testimony; and that the trial judge somehow prejudiced the appellants when he held a "colloquy with the jury" after it had been sequestered.

Statement of the Case

The Government's case-in-chief consisted primarily of the testimony of accomplice-witness Ira Kirschner. Kirschner, who was originally arrested by the F.B.I. for possession of the stolen goods in question here, was promised immunity from prosecution by the United States Attorney's office in return for his truthful and complete testimony concerning the persons and events surrounding the crime. Mr. Kirschner's testimony, which was apparently credited by the jury, evidenced the following facts.

Ira Kirschner was president of I.M.K. Sales, a wholesaler of health and beauty articles which operated out of a 2,000 square foot warehouse located in an industrial park in Plainview, New York. IMK was a small business in which Kirschner had only two employees and which was failing financially. During a chance meeting in a luncheonette in June of 1972, Kirschner explained his financial woes to the defendant Thomas Buttafuoco, a casual acquaintance of some six years. Buttafuoco at that time informed Kirschner that he was then in the trucking business and might be able to be of some help, adding "[p]erhaps we can make some money together" (124).*

Approximately two or three weeks thereafter, during the first week in July 1972, Buttafuoco called Kirschner and told him he had someone he wanted Kirschner to meet. About twenty minutes later Buttafuoco arrived at the warehouse accompanied by the appellant, Patrick Rayll, who was introduced to Kirschner as "Pat" (126). The three men then had a conversation during which Rayll asked Kirschner what kind of merchandise he could handle. Upon being told by Kirschner nationally advertised toiletries were most readily disposable, Rayll stated "we think we can do

* Unless otherwise specified, parenthetical page references are to the trial transcript.

something" (137). Phone numbers were exchanged and Buttafuoco and Rayll departed.

A week or two later Kirschner received a call from Buttafuoco asking how things were going. Kirschner told him things weren't going well and that he needed "something" real soon. He was told to "hang tight" (138).

Sometime during the last week of July 1972, Rayll telephoned Kirschner to arrange still another introduction. Later that same day Patrick Rayll brought appellant Polito to the warehouse and introduced him as "Tony." Kirschner was told that "Tony owned a trucking company and from time to time, gets his hands on real good loads we could sell and both make a lot of money" (141). The meeting between the three men lasted about a half hour, during which time they discussed Kirschner's customers, the inadequacy of the small, 2,000 square foot warehouse, and the possibility of getting a second or larger warehouse. At this meeting, Kirschner testified, he told Polito and Rayll he did not want to be involved in any violence—no hijackings (144). Polito assured him there would be none. Rather, he said, he had a trucking company next door to the Jones Trucking Co., a carrier for Colgate. From time to time Jones would get a load from Colgate. The plan was to obtain a blank pick-up order from Jones and present it to Colgate before the legitimate Jones truck arrived. Colgate would fill the order, unaware of any wrongdoing (144).

On August 28, 1972, at approximately 6 P.M., Buttafuoco called Kirschner at the warehouse and told him that Tony heard he was "sick" and wanted to come that night with "something" that would make him better. Kirschner objected saying he didn't want a visit at night (147).

About a half hour later, Rayll called and asked Kirschner if he had heard from Tony [Polito]. Kirschner again objected saying he didn't want a visit at night since the

industrial part was otherwise deserted and the activity would look highly suspicious to patrolling Nassau County Police. Kirschner was told to straighten it out with Tony Polito.

At approximately 7 P.M. on August 28, 1972, appellant Polito called the warehouse. He said he was in New Jersey with the goods and it would take a couple of hours to reach Plainview. Kirschner's continuing objection to the night-time delivery was unavailing; he was told to wait at the warehouse. Shortly thereafter Rayll appeared at the warehouse and he and Kirschner returned to the Rayll home in Bethpage for dinner.

At 9 P.M. that evening Kirschner and Rayll returned to the Plainview warehouse. Soon after they arrived, Buttafuco pulled up, followed shortly by a forty-foot tractor-trailer driven by appellant Pearson. Appellant Polito also arrived in the truck. The five men then proceeded to unload the 4,300 cases of stolen Colgate products into Kirschner's warehouse. The unloading took them over five hours (158). Kirschner testified that the warehouse was well-lit and that he had no trouble seeing his accomplices (155). Upon completion of the work, arrangements were made to inventory the goods by Friday, September 1, 1972, at which time the bills of lading would be delivered and payments arranged (160-163).

On August 31, 1972, just two days after the goods were stolen in New Jersey, Kirschner was arrested at his Plainview, New York warehouse by F.B.I. agents, and the stolen goods were recovered (179). On that same day he was taken to F.B.I. headquarters in Manhattan and was interviewed by agents. At that time he gave the agents the appellants' first names and identified photographs from photo spreads (82-98).

In addition to Kirschner's testimony appellants stipulated to certain facts which were therefore in evidence: that the goods recovered from Kirschner's warehouse were stolen from the Jones Trucking Company in New Jersey; that they were valued at more than the \$5,000 statutory minimum (734-35). The parties also stipulated as to the admission and content of certain telephone records showing toll calls charged to the various defendants' phone numbers. The records indicated the following phone calls on August 28, 1972: at 5:30 P.M. a call was placed from Polito's number to Buttafucio's number (293-94); at 6:38 P.M. a call was placed from the Rayburn Trucking Company, Pearson's employer which is located next to the Jones Trucking Company from which the Colgate products were stolen, to Polito's number (291); at 6:42 P.M. a call was placed from Rayll's number to Polito's number (291); at 6:50 P.M. a call was placed from Rayburn Trucking Company to I.M.K. Sales—Kirschner's warehouse (2911); and at 7:01 P.M. another call was placed from Rayburn Trucking to Polito's home (294). These recorded calls corroborated much of Kirschner's testimony.

Appellants took the stand and variously denied any knowledge of or participation in the crime. The sole issue for the jury was thus one of credibility—Kirschner's versus the defendants'. The jury chose to believe Kirschner and now the appellants appeal from their well-merited convictions.

ARGUMENT

POINT I

The introduction of the letter granting Kirschner immunity in return for his testimony in no way prejudiced appellants.

The sole issue raised by appellants Rayll and Pearson, and the only plausible issue raised by Polito, concerns the possibility of prejudice resulting from the prosecution's introduction into evidence of a letter promising Kirschner immunity. The letter, which promised immunity if Kirschner testified completely and truthfully regarding the crime, reads as follows:

"To Whom It May Concern:

On August 31, 1972, the F.B.I. seized a large quantity of stolen Colgate-Palmolive articles, at IMK Sales Corporation, 41 Kane Drive, Plainview, New York. Ira Kirschner is the President of the Corporation. He has agreed to testify truthfully and completely concerning the persons and incidents which constituted his involvement with the case. We have agreed not to prosecute Kirschner for the crimes arising from these events. The immunity does not include immunity for prosecution for perjury, should Kirschner's testimony be untrue or incomplete.

Very truly yours, Robert A. Morse, United States Attorney, By: Peter Schlam, Assistant United States Attorney" (119).

Appellants contend the letter amounts to a *self-serving* buttressing of the credibility of the Government's key witness. This, it is alleged, is particularly error here since Kirschner's credibility was the sole issue before the jury

(citing e.g. *United States v. Puco*, 436 F.2d 761 (2d Cir. 1971); *Gradsky v. United States*, 373 F.2d 706 (5th Cir. 1967)).

The introduction of the letter promising immunity was in no way intended to vouch for the credibility of Government's witness. Rather, the letter was introduced to allay any inference which might have arisen if the promise of immunity were elicited by defense counsel on cross-examination. The Government sought to inform the jury that Kirschner, an accomplice of the defendants in the alleged crime, was cooperating with the Government and that his testimony was given in consideration for a promise of immunity. This admission, which could have been damaging to the Government's case, was thus made freely before the jury.

That the letter does not bolster the credibility of the witness is clear from a cursory reading. The Assistant United States Attorney did not state that Kirschner's testimony was truthful, or that it was believed by the Government to be truthful. Nor did the Assistant put his own integrity in issue. See *United States v. Puco*, *supra*. All the letter did was note that Kirschner agreed to testify truthfully and completely and that the United States Attorney's Office had agreed not to prosecute. That Kirschner's testimony might in any event be perjurious was also clear from the text. The Assistant specified that the promised grant of immunity did not cover a prosecution for perjury "should Kirschner's testimony be untrue or incomplete." The jury was thus placed on notice that Kirschner might testify falsely, in which event the Government would bring perjury charges. Clearly there was no attempt on the part of the Government to vouch for the testimony of its witness. On the contrary, the letter constituted an admission on the part of the Government that Kirschner was testifying for selfish reasons—to avoid prosecution himself. The jury was thus free to draw the inference that his self-motivated testimony was false.

Moreover, the prosecutor's mere vouching for the credibility of its witness is not per se reversible error. See, *Lawn v. United States*, 355 U.S. 339, 359-360 (1958), footnote 15. The dispositive question is not whether the prosecutor impliedly or expressly conveyed a belief in his witness's testimony, but whether the prosecutor conveyed to the jury an impression that truthfulness was insured by something outside the evidence. It thus appears that if the belief is based upon the credibility of the testimony, reversible error does not follow. See also, *United States v. Grunberger*, 431 F.2d 1062 (2d Cir. 1970); *Gradsky v. United States*, 373 F.2d 706, 711 (5th Cir. 1967). Even if the letter in question was read as a vouching by the prosecutor for the credibility of Kirschner's testimony, there is nothing contained in the letter from which the jury could infer that the prosecutor's belief was based upon something not in evidence.

POINT II

Even if uncorroborated, Kirschner's testimony, if believed, was sufficient to sustain a guilty verdict.

Appellant Polito additionally contends that the District Court erred when it permitted the jury to return a guilty verdict based solely upon the uncorroborated testimony of accomplice Kirschner. Conceding that corroboration is not normally necessary in federal courts—that a jury charge on the cautious weighing of accomplice testimony is ordinarily sufficient—appellant Polito contends that in the present case such a charge was insufficient * (citing *Cash v. Culver*, 358 U.S. 333 (1959); *Caminetti v. United States*, 242 U.S. 470 (1917)).

* Appellant Polito did not take exception to any portion of Judge Judd's charge and he does not challenge the contents of the charge on appeal. He merely argues that for some undefined reason corroboration should have been required in this case.

Neither *Cash* nor *Caminetti* stand for the proposition for which they are cited. On the contrary, both cases suggest that corroboration is not necessary. Indeed, in *Caminetti*, the Supreme Court stated "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 242 U.S. at 495. Similarly, this Court has regularly held that accomplice testimony, though subject to great scrutiny, need not be corroborated. *United States v. Messina*, 481 F.2d 878 (2d Cir.), *cert. denied*, — U.S. — (1973); *United States v. Ferrara*, 458 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972); *United States v. Augello*, 452 F.2d 1135 (2d Cir. 1971), *cert. denied*, 406 U.S. 922 (1972).

Moreover, in this case, Judge Judd's charge to the jury on accomplice testimony was more than sufficient. He stated, in pertinent part:

When you evaluate the testimony of an accomplice you should consider that testimony with caution and receive it and evaluate it with great care. The fact that a witness has admitted that he has committed a serious crime may show a defect in his character, may make him more likely to lie than other people. And if he is going to try to avoid prosecution, he may try to court the favor of the prosecution, by implicating the defendants on trial. You can consider all that 740-741).

Polito's claim of error must be rejected.

POINT III

Judge Judd properly instructed the jury regarding the clarification requested.

Finally, appellant Polito argues that after the jury was sequestered and when it returned for clarification, the trial judge improperly "maintained a running conversation with the jury." In support of this contention, appellant cites the transcript at pages 781-789. This allegation is patently frivolous.

A reading of the pages cited shows the jury had returned for a clarification on apparent inconsistencies in the stipulated telephone records. Judge Judd carried on virtually no conversation with the jury. Most of the nine pages of transcript covers a side-bar conference out of the jury's presence, after which the Judge instructed the jury as follows:

The Court: Ladies and gentlemen of the jury, as I said before the record at page 296 reflects Mr. Schlam's statements that the call at 3:34 A.M. was a telephone call to the telephone of an individual by the name of John Berrico.

The name "Jesse" as appears for that same number on a different exhibit, there is nothing in the record as to why it is there or what explanation there is and the jury has to decide the case on the evidence that is there. I cannot add to it at this time.

It is inconceivable that such an instruction could be labeled prejudicial. Indeed, the trial court complied with defense counsel's requests and refrained from clarifying the apparent inconsistencies.

CONCLUSION

The judgments of conviction should be affirmed.

April 8, 1974

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 9th

day of April 1974, I deposited in Mail Chute Drop for mailing in the

U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and

State of New York, ~~x ten~~ two copies of Brief for the Appellee

of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper

directed to the person hereinafter named, at the place and address stated below:

H. Elliot Wales, Esq., 747 Third Avenue, New York, New York 10017;
Vincent L. Verdramo, Esq., 3163 Kennedy Boulevard, Jersey City,
New Jersey 07306; William J. Gallagher, Esq., Federal Defender
Services Unit, Legal Aid Society, U.S. Court House, Foley Square,
New York, New York 10007

Sworn to before me this
9th day of April 1974

Juanita Mayo
JUANITA MAYO
Notary Public, State of New York
No. 24-4501911

Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN